STATE OF MICHIGAN

COURT OF APPEALS

EDWARD J. BECHTELHEIMER, JR.,

Plaintiff-Appellant,

v

FAIK YOUSIF,

Defendant-Appellee.

UNPUBLISHED
April 6, 2006

No. 266393
Oakland Circuit Court
LC No. 2005-065226-NO

Before: Smolenski, P.J., and Owens and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) in this premises liability action. We reverse. This case is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff was a social guest of the lessee of a single-family residential home owned by defendant. Plaintiff testified that as he was entering the home, his foot became lodged under the raised threshold of the front door. Plaintiff's complaint alleges that the threshold of the front door was defective, and that defendant had notice of the defect and "failed to repair, replace or maintain" the threshold in a safe manner within a reasonable period of time. Plaintiff presented evidence suggesting that the lessee, Robert Gray, informed defendant of a problem with the threshold several months before the incident occurred in the context of mediating a dispute between Gray and defendant concerning rent and repairs. Gray testified that the threshold would "pop up frequently."

Defendant's motion for summary disposition asserted three arguments in support of judgment in his favor: (1) he lacked the requisite possession and control of the premises; (2) plaintiff was uncertain about the cause of the fall, thereby rendering the case too speculative to submit to a jury; and (3) the condition was open and obvious.

The trial court concluded that there was a question of fact concerning whether the hazard was open and obvious. However, the court reasoned that defendant owed no duty to protect or warn plaintiff because the condition was in an area that was leased exclusively to plaintiff's host and, therefore, defendant "lacked the possession and control of the premises necessary for the imposition of liability on this theory." The trial court did not address defendant's argument that plaintiff's case was too speculative to submit to a jury.

Summary disposition may be granted under MCR 2.116(C)(10) when "there is no genuine issue of material fact, and the moving party is entitled to judgment . . . as a matter of law." This Court reviews a trial court's decision granting or denying summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

Plaintiff asserts that defendant has a "statutory imposed covenant of possession and control over the premises . . . ." and relies on MCL 554.139(1).

The trial court's focus on possession and control is consistent with prior law that has since been overruled. In *Lipsitz v Schechter*, 377 Mich 685; 142 NW2d 1 (1966), the Court explained that at common law, a landlord's duty depended on control. A landlord did not have an obligation to keep in good repair the portions of the premises that were not under his control. *Id*., p 687. A landlord owed a duty to disclose to the tenant latent defects existing on the demised premises at the time possession was transferred of which the landlord had actual or constructive knowledge, but did not have a duty to make repairs absent an agreement to do so. *Calef v West*, 252 Mich App 443, 449-452; 652 NW2d 496 (2002). In *Mobil Oil Corp v Thorn*, 401 Mich 306, 311-312; 258 NW2d 30 (1977), the Supreme Court overruled certain limitations on landlord liability. As explained in *Woodbury v Bruckner*, 248 Mich App 684, 696-697; 650 NW2d 343 (2001), the Supreme Court in *Mobil Oil* overruled the "landlords out of possession" doctrine as discussed in *Lipsitz, supra*.

Moreover, the trial court's decision did not recognize the statutory duty imposed by MCL 554.139. Where the Legislature has imposed statutory duties on landlords, these laws may abrogate the common-law rule regarding a landlord's obligation to repair. See *Mobil Oil Corp, supra*, p 310 (addressing MCL 125.536); *Raatikka v Jones*, 81 Mich App 428, 430; 265 NW2d 360 (1978) (addressing Michigan's housing law, MCL 125.401 *et seq.*); *Crawford v Palomar*, 7 Mich App 21, 25-26; 151 NW2d 236 (1967) (addressing MCL 125.471). The owner's duty is imposed by statute *regardless of possession and control*." *Id.* (emphasis added.)

In this case, plaintiff relies on MCL 554.139, which states:

> (1) In every lease or license of residential premises, the lessor or licensor covenants:
>
> (a) That the premises and all common areas are fit for the use intended by the parties.
>
> (b) *To keep the premises in reasonable repair during the term of the lease* or license, and to comply with the applicable health and safety laws of the state and of the local unit of government where the premises are located, except when the disrepair or violation of the applicable health or safety laws has been caused by the tenants wilful or irresponsible conduct or lack of conduct.
>
> (2) The parties to the lease or license may modify the obligations imposed by this section where the lease or license has a current term of at least 1 year.
>
> (3) The provisions of this section shall be liberally construed . . . [Emphasis added.]

On appeal, defendant argues that the parties' lease effectively modified the statutory obligation of a lessor to keep the premises in reasonable repair as allowed by MCL 554.139(2). Defendant relies on the following provision in the lease:

> [Tenant covenants: . . . t]o keep the premises, including the equipment and fixtures of every kind and nature, during the term in as good repair and at the expiration thereof yield and deliver up the same in like condition as when taken, reasonable wear thereof and damage by the elements excepted.

This argument, which defendant did not raise below, is not persuasive. The lease provision referenced by defendant is essentially an express statement of the tenant's obligation not to commit waste, an obligation that is implicit in the landlord-tenant relationship. See 49 Am Jur 2d Landlord and Tenant p 675 § 831. The provision does not reveal an intention by the parties to modify the statutory obligation to keep the premises in reasonable repair.

Defendant argues that plaintiff may not rely on MCL 554.139 because he did not plead a violation of the statute. Defendant is correct that plaintiff did not specifically refer to the statute in his complaint. However, we decline to affirm the trial court's decision on this ground. To the extent plaintiff's complaint can be deemed deficient because it does not refer to the statute, plaintiff should be given an opportunity to cure the deficiency by amendment pursuant to MCR 2.116(I)(5).

Defendant argues that the statutory duty applies only to a tenant and not a guest. In *Crawford, supra,* p 27, this Court rejected a similar argument, stating, "We see no reason to make any distinction between the tenant and his guest in this regard. The statute imposes a duty in favor of anyone lawfully on the premises." A different result is not warranted here.

Defendant asserts that this Court may affirm summary disposition on the alternative grounds raised in its motion for summary disposition, but which were rejected or not addressed by the trial court.

First, defendant argues that plaintiff's testimony regarding the cause of his fall is too speculative to submit to a jury. We disagree. In his deposition testimony, plaintiff attributed his fall to his right toe becoming lodged under the threshold. Although he admitted that there might have been snow or ice on the steps, he did not equivocate in attributing his fall to the condition of the threshold. Plaintiff did not remember telling medical personnel what happened. Although defendant presented medical records indicating that plaintiff stated that he slipped on ice, that evidence may provide fertile ground for impeaching plaintiff, but it does not show that plaintiff's case is too speculative to submit to a jury.

Second, defendant argues that the hazard was open and obvious and that there are no special aspects that made it unreasonably dangerous. However, where there is a statutory duty to repair pursuant to MCL 554.139(1)(a), the open and obvious doctrine does not apply. *O'Donnell v Garasic,* 259 Mich App 569, 581; 676 NW2d 213 (2003).

Reversed.

/s/ Michael R. Smolenski
/s/ Donald S. Owens
/s/ Pat M. Donofrio